February 2, 2015

The Honorable Gina McCarthy, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. Mail Code: 1101-A
Washington, DC 20460

Dear Administrator McCarthy:

San Francisco Bay's waters are under attack, and we urgently need your leadership to preserve federal protection for them.

The U.S. Army Corps of Engineers is poised to relinquish federal Clean Water Act and Rivers and Harbors Act jurisdiction over San Francisco Bay salt ponds at the request of Cargill, the largest private corporation in the United States. Cargill's heavy lobbying of Corps lawyers resulted in two internal legal memos (attached) that would reverse decades of federal protection for Bay salt ponds, and upend long-established precedents. Their novel, unilateral re-interpretation of the Clean Water Act was created in secret, without EPA consultation, Congressional approval, or opportunity for public input.

This outrageous policy proposal from the Corps not only threatens to destroy a critical part of San Francisco Bay, it also would create a dangerous precedent that threatens federal oversight and regulation of other Waters of the United States. The Corps' failure to consult with the U.S. EPA, after previously committing to do so in this matter, repeats a dangerous pattern that should not be allowed to stand.

Scientists agree that Cargill's salt ponds in Redwood City are one of the most important shoreline habitats on the west side of San Francisco Bay. Surrounded by the Don Edwards San Francisco Bay National Wildlife Refuge, the ponds are a wintering and migratory spot for tens of thousands of shorebirds annually. There are fewer than 2,000 breeding pairs of the endangered Western Snowy Plover on the Pacific Coast, and plovers breed on those ponds. For these reasons, the ponds are within the already-authorized acquisition area of the wildlife refuge, and the U.S. Fish and Wildlife Service's Tidal Marsh Recovery Plan identifies the ponds as a priority opportunity site for tidal marsh habitat to benefit even more wildlife and the people of the Bay Area. Nearly-identical retired salt ponds near Vallejo were reconnected to the Bay several years ago, and wildlife is already flocking back to that restored habitat. Redwood City's salt ponds can have the same future – if the EPA preserves Clean Water Act protections for the ponds.

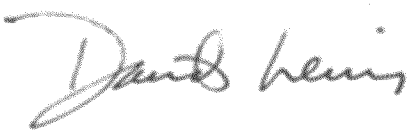
Cargill publicly declared its goal in 2012 – to win exemption from the Clean Water Act and other regulations for salt ponds in Redwood City, California, so it can pave over wetlands there to build thousands of homes in the Bay. The EPA has thus far preserved legal protection for the Bay's salt ponds, and it should continue to do so. We therefore encourage you to insist that the Secretary of the Army immediately:

1. Order the Corps to withdraw its two memoranda on this issue ("Legal Principles to Guide the Approved Jurisdictional Determination for the Redwood City Salt Plant" January 9, 2014, and the March 25, 2014 supplement to that memo) and explicitly declare both memoranda null and void.
2. Instruct the Assistant Secretary of the Army for Civil Works to consult formally with EPA Region 9 officials on this and any other review of the Clean Water Act and its application to salt ponds in San Francisco Bay, and develop a joint position on the appropriate legal interpretation and application of the Act to these ponds.

Should the Corps attempt to issue a determination declining to exercise Clean Water Act jurisdiction over this site, we encourage you to declare this a "special case" and ensure that the EPA takes over the determination process. The Corps process and actions to date regarding Redwood City salt ponds clearly justify EPA reasserting the lead responsibility for evaluating federal protection of these important waters of the United States.

Thank you for taking action to protect Waters of the United States.

Sincerely,



David Lewis
Executive Director
Save The Bay

Enclosures

# Legal Principles to Guide the Approved Jurisdictional Determination for the Redwood City Salt Plant

CECC-ZA

9 January 2014

## Introduction and Summary of Conclusions

For more than a century, private industry has been conducting salt making operations in the San Francisco Bay area. Because the salt making facilities are constructed at sites in or near tidal waters, there has been ongoing interest in the Corps' authority to exercise jurisdiction over these sites under Section 10 of the Rivers and Harbors Act of 1899 (RHA) and Section 404 of the Clean Water Act (CWA). Most recently, this interest has focused on the Redwood City salt plant, which is a part of Cargill's larger salt making operations in the Bay area.

DMB Redwood City Saltworks, the entity that represents Cargill and the potential developer of the site, has recently requested an approved jurisdictional determination for the 1,365 acre salt plant facility in Redwood City, CA. Because of this request, the Corps must examine the relevant laws and regulations as interpreted by the courts to identify the legal standards applicable to a jurisdictional determination for the site.

On several occasions the Corps and the courts have addressed the question of jurisdiction over other property in the Bay area owned by Cargill and used for salt making operations. The decisions reached on those occasions have involved different facts and have been made against a backdrop of evolving jurisprudence regarding the extent of the Corps' regulatory jurisdiction under the RHA and CWA. While the Corps' understanding of RHA jurisdiction has not changed substantially in recent years, the Supreme Court has issued several landmark decisions addressing CWA jurisdiction since the last time a court has considered the issue as it relates to a salt making operation on the San Francisco Bay.

Relying on binding precedents of the Supreme Court and the Court of Appeals for the Ninth Circuit, this document sets forth the legal standards that must be applied in determining RHA and CWA jurisdiction over the site of the Redwood City salt plant. It explains that the government's RHA jurisdiction in tidal waters extends shoreward to the mean high water (MHW) mark in its unobstructed, natural state. It concludes that the Cargill Redwood City property should be divided into two parcels for analytical purposes, one developed before 1940 and the other developed after 1940. There is no evidence in the record to suggest that the

Army ever exerted RHA jurisdiction over the parcel developed before 1940; the parcel was either never subject to RHA jurisdiction or RHA jurisdiction has been surrendered. The other parcel was developed pursuant to a 1940 War Department permit, and the Army retains RHA jurisdiction up to the MHW mark as it existed immediately prior to the construction of levees and a dyke authorized in this permit. The 1940 War Department permit authorizing the levees and dyke should be given deference when determining the historic location of the MHW mark. Finally, this document concludes that the liquids on both parcels, which have been subject to several years of industrial salt making processes, are not "waters of the United States" subject to CWA jurisdiction.

## Discussion

### Factual Setting[1]

As previously mentioned, a significant portion of the southern San Francisco Bay shoreline has been used for the production of salt through a process called solar evaporation. The Redwood City Saltworks site is comprised of approximately 1,365 acres that currently and/or historically have been used to make salt. The development of the Redwood City site can be described as having occurred on two distinct parcels in two phases, one of which involved a War Department permit issued in 1940 to a former owner, the Stauffer Chemical Company.[2] The two parcels are highlighted in different colors on the attached map.[3]

Parcel 1: The first phase of development occurred prior to 1940 and involved the western portion of the site, roughly between the historic location of First Slough and the current location of Seaport Boulevard. This portion of the site is identified in green on the attached map. It is bounded by a railroad line on the west, Bayshore Highway on the south, an existing levee on the east, and Westpoint Slough on the north. In 1940, it was shown as containing "Salt Evaporating Ponds," "Reclaimed Marsh," and a cement works.[4] This area approximately corresponds to the area that Cargill calls its crystallizer complex.[5]

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[1] The information presented in this section explains the context of the discussion of controlling legal standards and is based on the applicant's submission, information conveyed during site visits, and other sources. A formal determination of the physical characteristics of the site will be undertaken by the San Francisco District of the U.S. Army Corps of Engineers during the processing of the request for an approved jurisdictional determination.

[2] War Department Permit issued to Stauffer Chemical Company, January 16, 1940. The permit includes a diagram of the levee and dyke profiles in relation to the surrounding topography marked "Sheet 1" and a map of the site marked "Sheet 2." These documents together will be collectively referred to as "the permit" or "1940 permit."

[3] The attached map is a copy of the map that accompanied the 1940 permit and was identified as "Sheet 2" of that permit. The color highlighting has been added.

[4] War Department Permit issued to Stauffer Chemical Company, January 16, 1940 (Sheet 2); see also Attachment C to Exhibit 7 of the Redwood City Salt Plant Approved Jurisdictional Determination Submission (May 30, 2012).

[5] See Exhibit 2 of the Redwood City Salt Plant Approved Jurisdictional Determination Submission (May 30, 2012).

Parcel 2: The second phase of development occurred after 1940, immediately east of the first phase of development. The parcel where this development occurred is shown in red on the attached map. The development was undertaken pursuant to a War Department permit authorizing construction of "an earth dyke or levee across and along the bank of First Slough, and along the banks of Westpoint Slough and an unnamed tributary thereof" to enclose an area immediately east of the first development.[6] This area was leveed off from the Bay and developed into a complex of containment cells for salt production. The parcel is bordered on the west by the existing levee that forms the eastern border of the area developed prior to 1940, except that this common border diverges at the "Location of the Proposed Dam" across First Slough. From that point, the western border of the parcel follows the eastern shore of First Slough north, where the proposed levee or dyke is shown as a darker line. The northern border of the parcel follows this dark line along the southern shore of Westpoint Slough, and the eastern border follows the same darker line along the western shore of the unnamed tributary to Westpoint Slough. The southern border is the darker line that generally parallels the "Road on Levee." It approximately corresponds to the area Cargill calls its pickle and bittern complexes.[7]

The Redwood City salt plant entails only the later stages of the salt production process.[8] The initial stages of the process are conducted on other parcels, where the process begins by pumping raw Bay water into a leveed evaporation pond. The water is moved through a series of containment cells as the salinity increases. After approximately four years of subjecting the water to solar evaporation at other locations, the resulting liquid ("pickle") is transferred to the pickle complex at the Redwood City facility. Additional solar evaporation occurs there until the solution is saturated, at which point the pickle is moved into the crystallizer cells where the salt precipitates out of suspension. The resulting liquid, called "bittern," is pumped into the bittern complex cells, where it is stored until moved off site to be sold or recycled back into the salt production process. The salt that remains on the floor of the crystallizer cells is then mechanically scraped from the dry ground and loaded into trucks to be moved offsite.

## Rivers and Harbors Act of 1899

### Overview

Congress enacted the RHA to protect the navigable capacity of tidal and non-tidal waters. RHA jurisdiction is closely connected to the Federal navigation servitude, which reaches to the limits of navigable waters and permits the sovereign to prevent or remove

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[6] War Department Permit Issued to Stauffer Chemical Company, January 16, 1940.
[7] *Id.*
[8] This description is based on the Redwood City Salt Plant Approved Jurisdictional Determination Submission (May 30, 2012).

obstructions to navigation without compensation. This document explains that RHA jurisdiction extends to the MHW mark, which ordinarily is determined by identifying a line on the shore based on the average high tides over a period of years. This line can be ambulatory and special rules may apply to account for forces of nature, which may cause a shoreline to increase or decrease, or manmade improvements that counter these forces. Even where jurisdiction may normally attach, it may be surrendered by the government. Applying these legal precepts is necessary to determine the limits of RHA jurisdiction over Cargill's Redwood City property.

Geographic Scope of RHA Jurisdiction

The RHA regulates obstructions to the navigable capacity of any "navigable water of the United States."[9]

> [It] prohibits the creation of 'any obstruction not affirmatively authorized by Congress[] to the navigable capacity of any of the waters of the United States' [and] . . . make[s] it unlawful to 'build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army' or to 'excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.'[10]

Citing Supreme Court precedents, the Ninth Circuit has recognized that:

> The term "navigable waters" has been judicially defined to cover: (1) nontidal waters which were navigable in the past or which could be made navigable in fact by "reasonable improvements," *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921); and (2) waters within the ebb and flow of the tide. *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443 (1851); *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974), cert. denied, 420 U.S. 927.[11]

With respect to tidal waters, the Supreme Court has held that the term "navigable waters" as used in the RHA, extends to all places covered by the ebb and flow of the tide to the MHW

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[9] 33 U.S.C. § 403.

[10] *U.S. v. Milner*, 583 F.3d 1174, 1191 (9th Cir. 2009) (quoting 33 U.S.C. § 403).

[11] *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 753 (9th Cir. 1978) (hereinafter "*Froehlke*"). This is consistent with the general definition of "navigable waters of the United States" codified in regulation at 33 C.F.R. § 329.4.

mark.[12] This regulatory authority "is not dependent upon the depth and shallowness of the water," and includes "[m]arshlands and similar areas" that are "subject to inundation by the mean high waters."[13] The MHW mark is determined by where on the shore the average of all high tides reaches over a period of 18.6 years.[14]

RHA jurisdiction is coextensive with the reach of the federal navigation servitude.[15] The navigation servitude,

> sometimes referred to as a "dominant servitude," . . . or a "superior navigation easement," . . . is the privilege to appropriate without compensation which attaches to the exercise of the "power of the government to control and regulate navigable waters in the interest of commerce." *United States v. Commodore Park*, 324 U.S. 386, 390, 65 S.Ct. 803, 89 L.Ed. 1017.[16]

The limits of RHA jurisdiction and the navigation servitude are coextensive because their origins are grounded in the same desired purpose of preserving the navigable capacity of waterways.

In summary, the general rule in tidal areas is that RHA jurisdiction extends to the line on the shore reached by the plane of the mean high water averaged over a period of 18.6 years. This general rule applies when there is a relatively static, natural shoreline. But shorelines may not remain static. Oceans may rise, tides may wash away beaches, and humans may build bulkheads on the shore. If the shoreline has changed or has otherwise been altered, additional analysis must be undertaken to determine if the extent of jurisdiction has changed along with the changes to the shoreline, or if the extent of jurisdiction remains fixed at the MHW mark as it existed before the changes. If there have been changes in the shoreline, jurisdiction is either ambulatory, following the changes in the shoreline, or indelible, remaining fixed despite the changes.

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[12] *Borax*, 296 U.S. at 26-27. See 33 C.F.R. § 329.12(a)(2), which was changed in a rulemaking in 1982 in response to the *Froehlke* decision to eliminate the sentence that established the shoreward limit of navigable waters on the Pacific coast as the mean higher high waters. This regulatory change made the shoreward limit of jurisdiction for all coastal waters (Atlantic and Pacific) the same – the mean high water mark. 47 Fed. Reg. 31794, 31797-98 (July 22, 1982).

[13] See *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 263 (1915) and 33 C.F.R. § 329.12(b).

[14] *Barax Consolidated v. City of Los Angeles*, 296 U.S. 10, 26-27 (1935); *Frohlke*, 578 F.2d at 746.

[15] *Froehlke*, 578 F.2d. at 748-750, 752 ("The navigational servitude reaches to the shoreward limit of navigable waters.").

[16] *U.S. v. Virginia Electric Co.*, 365 U.S. 624, 327-28 (1961) (quoted in *Froehlke*, 578 F.2d at 752).

Ambulatory Nature of Jurisdiction

The scope and extent of RHA jurisdiction is ambulatory when there are gradual, lasting shifts in the volume of the water body or the character of the banks or shoreline.[17] In such cases, jurisdiction changes to follow the changing path and extent of the water:

> It is the established rule that a riparian proprietor of land bounded by a stream, the banks of which are changed by the gradual and imperceptible process of accretion or erosion, continues to hold the stream as his boundary; if his land is increased, he is not accountable for the gain, and if it is diminished he has no recourse for the loss. But where a stream suddenly and perceptibly abandons its old channel, the title is not affected, and the boundary remains at the former line.[18]

The Supreme Court has described how Federal regulatory authority shifts to follow the course of a water body as it moves over time, just as title follows the course of a water body as it moves over time:

> Nor is the authority of Congress limited to so much of the water of the river as flows over the bed of forty years ago. The alterations produced in the course of years by the action of the water do not restrict the exercise of Federal control in the regulation of commerce. Its bed may vary and its banks may change, but the Federal power remains paramount over the stream, and this control may not be defeated by the action of the state in restricting the public right of navigation within the river's ancient lines. The public right of navigation follows the stream and the authority of Congress goes with it.[19]

Thus, the contours of RHA jurisdiction change when the physical changes to the course or shoreline of a water body are gradual and long-lasting.[20] If the changes to the course or shoreline are sudden and perceptible due to avulsion[21] or man-made improvements, then the principle of indelible navigability applies to fix the previous limits of jurisdiction despite the changes as discussed further below.

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[17] *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 189 (1890) (cited in *Milner*, 583 F.3d at 1187).

[18] *Philadelphia Co. v. Stimson*, 223 U.S. 605, 624 (1912). See also *Oklahoma v. Texas*, 260 U.S. 606 (1923); *Hughes v. Washington*, 389 U.S. 290 (1967).

[19] *Philadelphia Co. v. Stimson*, 223 U.S. at 634-35.

[20] *State of Cal. ex rel. State Lands Commission v. U.S.*, 805 F.2d 857, 864 (1986) ("When a water line that constitutes a property boundary changes gradually and imperceptibly by the gradual deposit of solid material on its shore (accretion) or by gradual recession (reliction), the property boundary changes with it. . . . In such a situation, title is "ambulatory.").

[21] *Id.* at 864 ("where a water line changes violently and visibly, i.e., by avulsion, the property boundary does not change with the water but remains where it was prior to the change").

The Principle of Indelible Navigability

The principle of indelible navigability holds that sudden or man-made changes to a water body or its navigable capacity do not alter the extent of RHA jurisdiction, and thus the area occupied or formerly occupied by that water body will always be subject to RHA jurisdiction. This principle was discussed and relied upon by the Supreme Court in *Economy Light & Power,*[22] and has been incorporated in the Corps' definition of "navigable waters of the United States:" "A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which may impede or destroy navigable capacity."[23] The rule is expanded upon in 33 C.F.R. §§ 329.9 and 329.13: "an area will remain 'navigable in law,' even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change."[24] These regulatory definitions implementing the rule of indelible navigability have been unchanged since September 9, 1972.[25]

The Ninth Circuit decision in *Froehlke* embraced the rule of indelible navigability. The court reversed the lower court decision that "the Corps's jurisdiction under the River and Harbors Act includes all areas within the former line of MHHW in its unobstructed, natural state" and instead ruled that jurisdiction is to be fixed at the former line of MHW its unobstructed, natural state.[26] The opinion cited to "the principle in *Willink* . . . that one who develops areas below the MHW line does do at his peril" as dictating this result.[27] Thus, while RHA jurisdiction "extend[s] to all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state," where the natural state has been obstructed by a sudden change or an artificial change intended to produce that result, the former mean high water line as it existed before the obstruction becomes the fixed limit of RHA jurisdiction.[28]

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[22] *Economy Light & Power Co. v. U.S.*, 256 US 113, 118 (1921) ("The fact . . . that artificial obstructions [to navigation] exist capable of being abated by due exercise of the public authority, does not prevent the [water body] from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state. The authority of Congress to prohibit added obstructions is not taken away by the fact that it has omitted to take action in previous cases.")

[23] 33 C.F.R. § 329.4.

[24] 33 C.F.R. § 329.13.

[25] 37 Fed. Reg. 18289-92 (Sept. 9, 1972).

[26] *Froehlke*, 578 at 753.

[27] *Id.*

[28] *Id.*; 33 C.F.R. § 329.13. The principle of indelible navigability does not apply when natural changes that come about slowly due to accretion or reliction alter the course or limits of a water body. In such cases, "[t]he public right of navigation follows the stream . . . and the authority of Congress goes with it." *Philadelphia v. Stimson*, 223 U.S. 605, 634-635 (1912).

The Ninth Circuit issued a decision after its *Froehlke* decision that also addressed the effect of levees on RHA jurisdiction. The decision in *Milner* considered whether a shore defense structure that was constructed in uplands beyond RHA jurisdiction could become jurisdictional if gradual erosion caused the shoreline to move to intersect the previously constructed shore defense structure, such that the structure was now located in jurisdictional waters. The court found that such shore defense structures were subject to RHA jurisdiction, but did not determine how to fix the limits of RHA jurisdiction. Unlike the shore defense structures under consideration in *Milner*, the levees before us at the Cargill Redwood City site were permitted, water is not passing through or over them, erosion is not a factor, and there is no indication that the levees are in any way obstructing navigation.[29] *Milner* did not change the rule in *Frohlke* and is not applicable to circumstances at the Redwood City site.

Thus, under current Ninth Circuit jurisprudence, RHA jurisdiction in the San Francisco Bay area generally applies "to all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state."[30] The Federal regulations implementing the RHA are consistent with this rule of law and define the jurisdictional scope of the RHA statute to be fixed if "later actions or events [such as the construction of a levee or other improvement] . . . impede or destroy navigable capacity."[31]

Surrender of Jurisdiction

Several courts have added nuance to the principle of indelible navigability, specifically by introducing the concept of surrender of jurisdiction. The Third Circuit introduced the concept of surrender of jurisdiction in the case of *United States v. Stoeco Homes, Inc.*, which concerned the jurisdictional status of a parcel of land that had previously been a salt marsh subject to the ebb and flow of the tide, some areas of which had been filled to form fast land several decades earlier.[32] At the time the land at issue in *Stoeco* was filled, it was behind established harbor lines and it was Corps policy not to require any RHA permits for filling shoreward of established bulkhead lines.[33] The question before the court in *Stoeco* was whether blanket permission to fill behind established bulkhead lines could lead to the

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[29] If there was any obstruction of navigation, the Corps could protect the navigable capacity of the waters by invoking subsection (f) of the 1940 permit.

[30] *Froehlke*, 578 F.2d at 753.

[31] "A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which may impede or destroy navigable capacity." 33 C.F.R. § 329.4. The rule is expanded upon in sections 329.9 and 329.13 of the regulations: "an area will remain 'navigable in law,' even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change." 33 C.F.R. § 329.13.

[32] *U.S. v. Stoeco Homes, Inc,*. 498 F.2d 597, 600 (3rd Cir. 1974).

[33] *Id.* at 602-603.

permanent loss of RHA jurisdiction if the land was "improved" while the permission was in effect.[34] The Third Circuit looked at the statutory language and found:

> Section 10 by its plain language contemplates congressional consent to some encroachments on the navigational servitude, and delegates to the Army Corps of Engineers and the Secretary of the Army authority to grant such consent on its behalf. If the administrative agency gives an express consent by permit in a specific instance, with no reservation of the right to compel removal, surely that consent must be considered to be a surrender of the federal servitude over the fee in question.[35]

In *Stoeco*, the "improved" land was made fast by filling "substantially above mean high tide,"[36] and the court expressly limited the holding finding surrender "to tidal marshlands which had become fast land" during the time that the filling of those waters was permitted without restriction or reservation.[37] However, the fact that the improvement that resulted in a finding of surrender in this case was making the land fast does not mean that this is the only way a surrender could occur through improvement or modification of jurisdictional waters.

In *Froehlke*, the Ninth Circuit suggested that the concept of surrender could apply in the San Francisco Bay, as well. In evaluating the scope of RHA and CWA jurisdiction over salt plants within the Bay, the Ninth Circuit held that "in tidal areas, 'navigable waters of the United States,' as used in the Rivers and Harbors Act, extend to all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state."[38] However, the court continued:

> Our holding that the MHW line is to be fixed in accordance with its natural, unobstructed state is dictated by the principle recognized in *Willink*, supra, that one who develops areas below the MHW line does so at his peril. We recognize that under this holding issues of whether the Government's power may be surrendered or its exercise estopped, and if so, under what circumstances and to what extent, may arise. Leslie, for example, may contend that there has been a surrender by the Corps of its

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[34] The three-part inquiry that the Third Circuit made to determine whether RHA jurisdiction was surrendered in *Stoeco* included "whether Congress intended that §10 was intended [sic] to have continuing application to *improved* land formerly within the navigable waters of the United States." *Stoeco*, 498 F.2d at 608 (emphasis added). "Improve" is defined by Webster's as, inter alia, "to augment or enhance in value or good quality; to make more profitable, excellent, or desirable;" and "to enhance in value by bringing under cultivation or reclaiming for agriculture or stock raising." *Webster's New Internatianal Dictionary of the English Language*, Second Edition, Unabridged, 1939.

[35] *Stoeco*, 498 F.2d at 610.

[36] *Id.* at 600.

[37] *Id.* at 611.

[38] *Fraehlke*, 578 F.2d at 754.

> power under the Rivers and Harbors Act with respect to certain land below the MHW line.[39]

The court also observed that "at this time it is not necessary for us to pass on issues such as were before the court in *Stoeco*."[40] Thus, the Ninth Circuit recognized that it may be possible that the United States could surrender jurisdiction, but the court did not rule on this point.

Surrender Applied to the Redwood City Salt Plant

In the case of the Redwood City salt plant, separate surrender analyses are necessary for the two parcels described above because of their distinctive histories.

The western portion of the site (parcel 1, shown in green on the attached map) was already improved for salt-making purposes at the time the January 16, 1940, War Department permit was issued. The map accompanying the 1940 War Department permit shows this parcel as "Salt Evaporating Ponds" and "Reclaimed Marsh," and identifies the location of the existing levee surrounding those areas.[41] There is no evidence that the Corps ever asserted jurisdiction over this area or the construction of the levees on this parcel.[42] Given the acquiescence of the Corps to the improvement of the western portion of the site prior to 1940, either the property was never subject to RHA jurisdiction or RHA jurisdiction has been surrendered.[43]

The analysis is different for the eastern portion of the site (parcel 2, shown in red on the attached map), which was leveed off from the San Francisco Bay pursuant to the 1940 War Department permit. Here, the question of whether the Corps retains RHA jurisdiction over formerly tidal waters is principally informed by the terms of the permit. The permit authorized the Stauffer Chemical Company, Cargill's predecessor in interest, to:

> construct an earth dyke or levee across and along the bank of First Slough, and along the banks of Westpoint Slough and an unnamed tributary thereof, in Westpoint Slough at about 1.0 mile southeasterly of the mouth of Redwood Creek, San Mateo County,

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[39] *Id.* at 753.
[40] *Id.*
[41] Aerial photographs submitted by the applicant show the levees depicted on the 1940 permit existed in the same configuration in 1930. See Attachment C to Exhibit 7 of the Redwood City Salt Plant Approved Jurisdictional Determination Submission (May 30, 2012).
[42] This is consistent with the Corps practice immediately following the passage of the RHA of only regulating areas and activities that would have a relatively direct impact on the navigable capacity of navigable waters. See *Stoeco*, 498 F.2d at 606.
[43] *Stoeco* holds that the "long-standing administrative practice" not to require explicit or specific permission to fill behind harbor lines prior to 1970 was sufficient consent to surrender the navigation servitude. Similarly, the administrative practice of only regulating activities that would have a relatively direct impact on the navigable capacity of waters at the turn of the last century may also be sufficient to surrender the navigation servitude where navigable waters were filled or otherwise developed with the acquiescence of the Federal government during that period.

> California, in accordance with the plans shown on the drawing attached hereto marked "Proposed Dam and Levee East of Redwood Cr., San Mateo County, California, Application by Stauffer Chemical Co., Dated Dec. 1939."[44]

The permit also contains a number of conditions that are designed to protect the navigable capacity of the named waters. It is accompanied by a map (Sheet 2) and a diagram (Sheet 1), which depicts certain features of the site and elevation data. Reading these documents together, it is clear that the Army was exercising its jurisdiction under the RHA when it sought to regulate the construction of these improvements under the permit.

The permit also contains an express reservation that allows the United States to force the removal of any of the permitted work:

> That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of War, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required, upon due notice from the Secretary of War, to remove or alter the structural work or obstruction caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed.[45]

This condition would seem to be exactly the type of "reservation of the right to compel removal" that the Third Circuit indicated could prevent surrender of jurisdiction.[46] While this reservation has limitations regarding when the Corps can order removal of permitted fill, the fact that there is *any* reservation is sufficient to put the landowner on notice that "one who develops areas below MHW does so at his own peril"[47] and thus prevents a surrender of jurisdiction. Because there is no surrender, the areas previously below the MHW mark continue to be regulated under the RHA.

On this basis, surrender has not been triggered and the rule of indelible navigability applies to the eastern portion of the site. Accordingly, any areas that were RHA jurisdictional waters when the levees were permitted in 1940 are still jurisdictional under the RHA.

Determining the Extent of RHA Jurisdiction

With these legal rules in mind, the San Francisco District should expeditiously finalize the jurisdictional determination for the Redwood City salt plant site. Consistent with the

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[44] War Department Permit issued to Stauffer Chemical Company, January 16, 1940.
[45] Condition (f) of the January 16, 1940 War Department permit.
[46] See *Stoeco*, 498 F.2d at 610.
[47] *Froelke*, 578 F.2d at 753

foregoing discussion, the determination should include different findings for the two parcels comprising the site.

For the western portion of the site (parcel 1, highlighted in green on the attached map), RHA jurisdiction does not attach. There is no evidence that the Army ever asserted jurisdiction over this area or the construction that took place on this parcel. Either the property was never subject to RHA jurisdiction or RHA jurisdiction has been surrendered. No further analysis is required for this parcel.

For the eastern portion of the site (parcel 2, highlighted in red on the attached map), which is bordered by the levees that were authorized by the 1940 permit and which includes the area behind the dyke on First Slough, jurisdiction has not been surrendered and is retained by the rule of indelible navigability. For this area, the scope of RHA jurisdiction was fixed at the time the levees were constructed. Accordingly, the District must determine what areas of the parcel, if any, were below the MHW mark at the time the levees were constructed.

In making this determination, the District must take into account the information contained in the 1940 permit and accompanying attachments. These documents reflect the understanding of the parties at the time the permit was issued and should be accepted as the best available evidence of the locations of the features of the site, the elevations of the levees and dyke to be constructed, and the resources warranting protection. The permit identifies three of the more substantial features, First Slough, Westpoint Slough, and an unnamed tributary thereof, in specifying the location of the levees to be constructed.[48] The terms of the permit indicate that these were the waters that the terms and conditions were intended to protect. The diagram accompanying the permit (Sheet 1) shows that the base of the dyke that was constructed across First Slough was below the MHW mark. It also shows that the other levees on the site were to be constructed on marshlands at locations near the above named waters at elevations generally equal to the mean higher high water mark, which is above the MHW mark. The marshlands appear to be identified by horizontal lines shading specific areas of the map. Finally, the map (Sheet 2) also shows the levees crossing three smaller sloughs. These smaller sloughs are not specifically identified in the permit. The permit and its accompanying documents are silent on the elevations of these sloughs and on whether the Army intended to extend RHA protection to them.

In finalizing its jurisdictional determination for this parcel, the District may also consider other existing historical information that supplements the information contained in the permit and its accompanying documents to ensure a full and accurate understanding of the site. However, the District has the burden of substantiating the location of any tidal waters that

[48] War Department Permit issued to Stauffer Chemical Company, January 16, 1940.

were below the MHW mark at the time the levees were constructed to assert RHA jurisdiction over those areas. The information and representations in the permit should receive deference unless there is convincing evidence that the other historical materials provide a more accurate representation of the site at the time the levees were constructed.

## Clean Water Act

### Overview

The geographic extent of CWA jurisdiction is a distinct question from RHA jurisdiction.[49] The geographic extent of CWA jurisdiction is generally greater than that under the RHA; however, that is not always the case.[50] Because of the different goals of the statutes and as a consequence of the rule of indelible navigability, some areas that are no longer covered by "waters" may be subject to RHA jurisdiction but not CWA jurisdiction. There is no comparable rule of indelible jurisdiction for the CWA.[51] The following discussion analyzes the CWA and implementing regulations in light of relevant legal precedent to determine whether the site of the Redwood City salt plant is subject to CWA jurisdiction. It concludes that the liquid pickle and bittern on the site is not "water" and that therefore these liquids are not subject to CWA jurisdiction. It examines the Ninth Circuit's basis for finding CWA jurisdiction over other Bay-area salt plant sites in *Froehlke*, and explains why that decision is not applicable to the Redwood City site.

### Factual Setting

The factual setting set forth at the beginning of this document is relevant to the discussion of CWA jurisdiction over the site. However, there are some details that are particularly relevant to CWA jurisdiction that merit mention here. Specifically, the entire site is controlled by Cargill, and other parties cannot access the site without Cargill's permission. The entire Redwood City site had been converted into its current configuration by 1951, before passage of the CWA in 1972, and has operated as an industrial salt-making facility since that time.[52] That conversion required significant manipulation of the immediate geography. The

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[49] See *Milner*, 583 F.3d at 1194 ("the scope of the Corps' regulatory authority under the CWA and RHA is not the same").

[50] See *U.S. v. Riverside Bayview Homes, Inc.*, 474 US 121, 133 (1985) ("Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.").

[51] Environmental Protection Agency, *Guidelines for Specification of Disposal Sites for Dredged or Fill Material*, 45 Fed. Reg. 85,336, 85,340 (Dec. 24, 1980) ("When a portion of the Waters of the United States has been legally converted to fast land by a discharge of dredged or fill material, it does not remain waters of the United States subject to section 301(a). The discharge may be legal because it was authorized by a permit or because it was made before there was a permit requirement.").

[52] Redwood City Salt Plant Approved Jurisdictional Determination Submission (May 30, 2012) Attachment B. p. 9.

site is partitioned into various cells by a network of levees that also serve as roads and building pads.[53] Most of the cells are used to contain the liquids that are used to produce salt or that are a by-product of the salt making process. The process on this site begins when pickle is pumped from facilities at other locations after several years of processing. That liquid is then moved through a succession of cells at the Redwood City site before the salt is precipitated out of suspension in the crystallizer cells.[54] Once the salt precipitates out of solution, the remaining liquid, bittern, is moved into other cells to be recycled back into the process or sold for other uses.[55] The content of the cells is controlled by the operator of the site and all cells can be entirely drained.[56] For the solar evaporation process to work and increase the concentration of the pickle, the containment cells must be hydrologically separated from the neighboring Bay waters.[57] Any discharge of the pickle or bittern into CWA jurisdictional waters would require a CWA permit.[58]

CWA Statutory Scheme

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[59] The statute makes "the discharge of any pollutant by any person [into the waters of the United States] . . . unlawful" unless such discharge is permitted under Section 402 or 404 of the Act.[60] The U.S. Environmental Protection Agency (EPA) administers the Section 402 program through the National Pollution Discharge Elimination System (NPDES) to regulate all pollutants except for dredged material and fill material.[61] As part of the NPDES program, EPA establishes effluent limitations guidelines that set pollution control standards for specific pollutants or classes of pollutants. Any discharge of pollutants with effluent limitations requires a permit and must meet those guidelines to comply with the CWA. The U.S. Army Corps of Engineer administers the Section 404 program to regulate the discharge of dredged material and fill material.[62]

The geographic scope of CWA jurisdiction is defined in statute as "navigable waters" and the "contiguous zone or the ocean."[63] "Navigable waters" is further defined by the statute to

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[53] *Id.* at 4.
[54] *Id.* at 3-4.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 8.
[58] *Id.* at 25 n.49. See also 40 C.F.R. § 415.160 et seq.
[59] 33 U.S.C. § 1251.
[60] 33 U.S.C. § 1311. See also 33 U.S.C. § 1362(7) and (12) defining "navigable waters" and "discharge of a pollutant" respectively.
[61] 33 U.S.C. § 1342.
[62] 33 U.S.C. § 1344.
[63] 33 U.S.C. § 1362.

mean "the waters of the United States, including the territorial seas."[64] The structure of the statute makes it clear that the CWA was intended to protect more than just the "traditional navigable waters" that are jurisdictional under the RHA.[65] Congress meant for the definition of the term "navigable waters" to "be given the broadest constitutional interpretation"[66] because "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."[67] However, recent Supreme Court opinions have held that the term "navigable" cannot be read out of the statute when interpreting the jurisdictional scope of the CWA.[68] Thus, Corps permits are required for discharges of dredged material or fill material into "navigable waters" defined as "waters of the United States."

Regulations Implementing the CWA

The agencies charged with implementing the CWA, the EPA and the Corps, define "waters of the United States" by regulation to reach beyond "navigable waters" as that term was traditionally used to protect "all waters that together form the entire aquatic system."[69] While the regulatory definition of jurisdictional "waters of the United States" is broad, it does not cover everything that is wet.[70] Indeed, the Supreme Court has recognized that certain types of waters are not jurisdictional,[71] as has the Ninth Circuit.[72] EPA and Corps regulations set forth seven generally defined types of water bodies that are jurisdictional "waters of the United States:"

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (2) All interstate waters including interstate wetlands;
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa

[64] 33 U.S.C. § 1362(7).
[65] *Rapanos v. U.S.*, 547 U.S. 715, 731 (SCALIA, majority), 767-68 (KENNEDY, concurring) (2009).
[66] 42 Fed.Reg. 37122, 37127 (July 19, 1977) (quoting H.R. Report No. 92-1465 at 144).
[67] S.Rep. No. 92-414, 1972 U.S.C.C.A.N 3668, 3742 (1972).
[68] *Rapanos*, 547 U.S. at 731 (SCALIA, majority), 779 (KENNEDY, concurring).
[69] *U.S. v. Riverside Bayview Homes*, 474 US at 133 (quoting the preamble to the rulemaking establishing the regulations defining the geographic scope of CWA jurisdiction, 42 Fed.Reg. 37128 (1977)); see also 33 C.F.R. Part 328.
[70] For example, "non-tidal drainage and irrigation ditches excavated on dry land." 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).
[71] See *Rapanos*, 547 U.S. 715; *Solid Waste Agency of Northern Cook County v. USACE*, 531 U.S. 159 (2001) (hereinafter "*SWANCC*").
[72] See *San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700 (9th Cir. 2007) (holding that a pond alleged to be jurisdictional was not a "water of the United States" because "mere adjacency provides a basis for CWA coverage only when the relevant waterbody is a 'wetland,' and no other reason for CWA coverage of Cargill's pond is supported by evidence").

lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;
(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;
(6) The territorial seas;
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.[73]

Any water that does not fall within one of those defined types of water is not jurisdictional under the CWA. Additionally, even if a water falls within one of the seven defined types, jurisdiction will not attach if it is one of two categories of water explicitly excluded from jurisdiction by the regulations:

> (8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
>
> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.[74]

Corps districts must determine if a water falls within one of the seven categories of jurisdictional water. If a district determines that the water does not fall within one of these seven categories or that it is one of the explicitly excluded types, then the water is not jurisdictional.

In reviewing this list of "waters of the United States," it is evident on first impression that the liquids on the Redwood City site do not fall clearly into any of the seven categories. The site has been highly altered to facilitate the salt manufacturing process. This alteration of the site and a century of industrial salt making have eliminated any trace of the prior marshland

[73] 33 C.F.R. § 328.3(a).
[74] 33 C.F.R. § 328.3(a).

or wetland character of the site. The liquids on the site are intentionally hydrologically separated from the Bay and are not subject to the ebb and flow of the tide. While the liquids on the site originated as water from the Bay, they have been subjected to years of carefully managed processing that has rendered the liquids legally and chemically distinguishable from the water in the Bay. These liquids are wholly within the boundaries of the State of California and are not navigated in interstate commerce, or a part of the territorial seas. Likewise, the liquids are not impoundments of waters otherwise defined as waters of the United States.

These facts suggest that the liquids on the Redwood City site do not fall in any of the seven categories of "waters of the United States" as set forth in the regulations. However, several recent Supreme Court decisions have made the task of determining CWA jurisdiction more complicated than simply applying the regulations. The Court has twice found that the Corps' interpretation and application of the regulatory definition of "waters of the United States" exceeded the scope of jurisdiction provided by the CWA statute. Therefore, the Corps must apply both the regulatory definition of the scope of jurisdiction and the standards for jurisdiction established by the Supreme Court. A water must be determined to be jurisdictional under the regulations *and* the standards established by the Supreme Court for the CWA to apply.

CWA Applies Prospectively

The Supreme Court has "long declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent."[75] This presumption holds true for the CWA. The CWA is intended "to regulate discharges of dredged or fill material into the aquatic system as it exists, and not as it may have existed over a record period of time."[76] This was recently confirmed by the Ninth Circuit in *Milner*:

> if land was dry upland at the time the CWA was enacted, it will not be considered part of the waters of the United States unless the waters actually overtake the land, even if it at one point had been submerged before the CWA was enacted or if there have been subsequent lawful improvements to the land in its dry state.[77]

Thus, areas that were lawfully filled, either before the passage of the CWA or pursuant to a CWA permit, are no longer subject to CWA jurisdiction.[78] The fact that the majority of the area

[75] *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994).
[76] 42 Fed. Reg. 37122, 37128 (July 19, 1977).
[77] *Milner*, 583 F.3d at 1195.
[78] Environmental Protection Agency, *Guidelines for Specification of Disposal Sites for Dredged or Fill Material*, 45 Fed. Reg. 85,336, 85,340 (Dec. 24, 1980) ("When a portion of the Waters of the United States has been legally converted to fast land by a discharge of dredged or fill material, it does not remain waters of the United States

within the Redwood City site was improved in a manner that did not necessarily raise the elevation above that of the MHW does not make this principal any less applicable. A CWA jurisdictional determination must be based on the site conditions today and not some prior site condition that no longer exists.[79]

Supreme Court Holdings on CWA Jurisdiction

The Supreme Court has twice found that the Corps' application of the regulations defining the jurisdictional scope of the CWA exceeded the statutory authority.[80] The Court expressed concern over the Corps' broad interpretation and application of the term "waters of the United States" in both cases. Indeed, the Supreme Court observed that in drafting those regulations, the agencies "deliberately sought to extend the definition of 'the waters of the United States' to the outer limits of Congress's commerce power."[81] The Supreme Court held "that 'the waters of the United States' in § 1362(7) cannot bear the expansive meaning that the Corps would give it"[82] and is "not 'based on a permissible construction of the statute.'"[83] In the most recent of those cases, *Rapanos*, the Supreme Court set out two alternative standards for determining CWA jurisdiction. As a result, the Corps must ensure that any assertion of CWA jurisdiction is consistent with the regulations *and* at least one of the two alternative standards established in the *Rapanos* decision.

The two alternative standards for determining what is jurisdictional under the CWA exist because Supreme Court's decision in *Rapanos* was issued without a majority opinion. Three Justices joined in the plurality opinion that Justice Scalia authored, which had arguably the narrower standard for what is jurisdictional under the CWA. Justice Kennedy concurred in the judgment but wrote his own opinion setting forth a different legal standard than that of the plurality. Four justices dissented and would have held that a far more inclusive standard applied. In such cases, controlling legal principles may be derived from those principles espoused by five or more justices.[84] Therefore, there is CWA jurisdiction when the plurality's standard, authored by Justice Scalia, is satisfied, or when the standard in Justice Kennedy's

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subject to section 301(a). The discharge may be legal because it was authorized by a permit or because it was made before there was a permit requirement.").

[79] See *Milner*, 583 F.3d at 1195;

[80] *Rapanos*, 547 U.S. 715; *SWANCC*, 531 U.S. 159.

[81] *Rapanos*, 547 U.S. at 724 (SCALIA, plurality).

[82] *Id.* at 731-32 (SCALIA, plurality), 778-79 (KENNEDY, concurring).

[83] *Id.* at 739 (SCALIA, plurality).

[84] See *Marks v. United States*, 430 U.S. 188, 193-94 (1977); *Waters v. Churchill*, S11 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test ... that lower courts should apply," under *Marks*, as the holding of the Court); cf. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); *Alexander v. Sandoval*, 532 U.S. 275, 281-282 (2001) (same).

concurring opinion is satisfied. The plurality concluded that the agencies' regulatory authority should extend only to "relatively permanent, standing or continuously flowing bodies of water . . . connected to traditional interstate navigable waters," and to "wetlands with a continuous surface connection to" such relatively permanent waters.[85] Justice Kennedy held that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."[86]

Supreme Court on CWA Jurisdiction and What Constitutes "Waters"

Applying the standards for CWA jurisdiction set forth by the Supreme Court to the Redwood City site will be more instructive than applying the regulations to determine if the liquids located there are jurisdictional. This is because the liquids at the site raise a fundamental question: what kinds of liquids constitute "water" as that term would be understood by a majority of the Supreme Court?

In the Supreme Court's most recent decision regarding CWA jurisdiction, *Rapanos*, the plurality opinion emphasized that "the CWA authorizes federal jurisdiction only over 'waters.'"[87] The opinion analyzes the meaning of the statutory definition of "navigable waters," which is "the waters of the United States," to determine if the agencies' interpretation and application of that term is consistent with the authority conferred by the statute. The analysis includes an extensive dissection of the definition of "water" from the second edition of Webster's New International Dictionary because the term "water" is not defined in statute or regulation. The plurality concludes that the term can only mean "relatively permanent, standing or flowing bodies of water."[88] The plurality opinion cites to this definition to require a more limited scope of CWA jurisdiction than the agencies' interpretation, which allowed for CWA jurisdiction over certain intermittent and ephemeral waters. The plurality demanded that the scope of CWA jurisdiction "accord[] with the commonsense understanding of the term [water]."[89] The concurring opinion in *Rapanos* also looks at the same dictionary definition, but does so to show that an understanding of the term "waters" that is broader than the majority's also accords with the dictionary and common sense.[90] Justice Kennedy does not reject the principle that the definition of "water" needs to accord with the commonsense understanding, but rather he believes that a broader interpretation of the term is possible within such a commonsense understanding. The *Rapanos* decision shows that the Supreme Court will closely

[85] *Rapanos*, 547 U.S. at 739, 742 (SCALIA, plurality).
[86] *Id.* at 759 (KENNEDY, concurring). Chief Justice Roberts wrote a separate concurring opinion explaining his agreement with the plurality. See 547 U.S. at 757-759.
[87] *Rapanos*, 547 U.S. at 731.
[88] *Id.* at 732.
[89] *Id.* at 733.
[90] *Id.* at 770.

examine regulatory interpretations of the scope of CWA jurisdiction, and that while interpretations of language may differ, the Supreme Court will likely demand that any interpretation of "waters of the United States" be consistent with commonly accepted understandings of terms such as "water."

Applying this analysis to the Redwood City site, the Corps must determine whether the liquids on the site are "water" as a majority of the Supreme Court understands that term. The *Rapanos* decision is instructive on the type and method of inquiry involved, but the specific analysis in *Rapanos* is not relevant to the issue at hand because the discussion in that case contrasted geographic features that were regularly covered with water with features that were normally dry or only occasionally covered with water. It did not address what kinds of liquids qualify as "water." Therefore, we are left to apply the analytical rubric from *Rapanos* to this slightly different question regarding the meaning of the term "water."

Looking at the definition of "water" in the second edition of Webster's New International Dictionary, the same definition relied on by Justice Scalia in the plurality opinion in *Rapanos*, one finds that the first two definitions of "water" refer to the naturally occurring substance that (1.a.) "descends from the clouds in rain," (1.b.) the "substance having the composition $H_2O$," or (2) "liquid substance occurring not chemically combined, in any of various quantities, states or aspects" . . . (2.a.) "[a]s derived from natural sources" or (2.b.) "[a]s found in streams and bodies forming geographical features such as oceans, rivers, lakes."[91] Only the third definition includes "liquid containing or resembling or of the fluidity and appearance of water" or a "liquid prepared with water, as by solution."[92] Tellingly, this later meaning of the term is defined by contrasting the liquid with "water," meaning that identifying such liquids as "water" is more attenuated and less "commonsense" than those described in the first two definitions.

Applying the *Rapanos* plurality's method of analysis, the "commonsense understanding" of "water" would include relatively naturally occurring forms of $H_2O$ such as those found in "rivers, lakes, and seas." This doesn't mean that only pure water, or pure sea water, is regulated under the CWA. After all, the Cuyahoga River was not a pure, unadulterated water when it caught fire in 1969. That event is widely regarded as "one of a handful of disasters that led to . . . the passage of the Clean Water Act."[93] So, it can be assumed that natural, but contaminated or adulterated, water bodies like the Cuyahoga in 1969 are among the types of

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[91] *Webster's New International Dictionary* 2882 (2nd ed. 1954) (hereinafter "Webster's Second").
[92] *Id.*
[93] Christopher Maag, *From the Ashes of '69, a River Reborn*, N.Y. Times, June 21, 2009, http://www.nytimes.com/2009/06/21/us/21river.html; see also *Rapanos*, 547 U.S. at 809 (STEVENS, dissent) ("Congress passed the Clean Water act in response to widespread recognition – based on events like the 1969 burning of the Cuyahoga River in Cleveland – that our waters had become appallingly polluted.").

waters that Congress intended to cover under the CWA. However, the liquids on the Redwood City site are a different sort. Those liquids are not within a natural water body; they are contained within an intentionally engineered industrial complex. The composition of the liquids is not a consequence of the discharge of pollutants or the disposal of wastes, but a consequence of a purposeful industrial process to create a product. And, unlike the Cuyahoga River, there are no potential users of the liquids at the Redwood City site other than the site owner that could be impacted by their composition.[94]

The commonsense understanding of the term "water," and one that accords with the definition of "water" in Webster's Second, does not include the pickle or bittern on the Redwood City site, which are products of an industrial process. Other than being in an aqueous form and being originally derived from Bay waters, the liquids on the Redwood City site are more commonly understood to be a chemical used in, or a byproduct of, an industrial process. Additionally, these liquids are regulated as a pollutant under Subpart P (Sodium Chloride Production Subcategory) of the CWA.[95] Thus, these liquids should be treated as an industrial product and not as "water," which is consistent with how EPA has classified this substance in its regulations and which means that they should not be treated as a jurisdictional water under the CWA.

Applicability of the CWA to the Redwood City Site

In sum, the pickle and bittern liquids at the Redwood City site are an industrial product regulated as a pollutant under the CWA; the site is not part of the aquatic system; and any discharge of the liquids to waters of the United States would require a CWA permit. Given these facts and the purposes the CWA is intended to serve, the pickle and bittern liquids at the site are *not* "water" potentially subject to jurisdiction under the CWA.

*Leslie Salt Co. v. Froehlke*

The *Froehlke* decision was discussed extensively in the section above on RHA jurisdiction, but it bears mentioning again here because that case addressed the jurisdictional status of Bay area salt ponds under the CWA as well as the RHA. In *Froehlke*, the Ninth Circuit

[94] This is similar to waste treatment systems, which are categorically excluded from CWA jurisdiction in the regulatory definition of "waters of the United States" because they are not susceptible to being used by entities operating in interstate commerce other than the entity that controls the waste treatment system. The rationale behind this is that the agencies were concerned with regulating water pollution that has the potential to affect entities operating in interstate commerce, rather than regulating the use of waters in interstate commerce if that use had no potential to affect other users in interstate commerce. See EPA, Decision of the General Counsel, *NPDES Permits*, Opinion No. 73 (Dec 15, 1978); *National Pollutant Discharge Elimination System; Revision of Regulations, Final Rule*, 44 Fed.Reg. 32854, 32858 (June 7, 1979). See also, EPA, *A Collection of Legal Opinions*, Vol. 1 at 295.

[95] 40 C.F.R. § 415.160 et seq.

corrected the district court's holding that CWA jurisdiction was "coterminous" with RHA jurisdiction and that both were determined by identifying the "former line of MHHW of the bay in its unobstructed, natural state."[96] The Ninth Circuit made it clear that instead of being "coterminous" with RHA jurisdiction, CWA jurisdiction was generally broader than RHA jurisdiction.[97] The Ninth Circuit also addressed the question of "whether the Corps' jurisdiction covers waters which are no longer subject to tidal inundation because of man-made obstructions such as Leslie's dikes," which the court viewed as the central issue under review in that case.[98] In addressing this question, the court relied on the finding that the liquid behind the levees was the same as the water in the San Francisco Bay.[99] The court also noted that Leslie used the salt ponds to manufacture a product that is sold in interstate commerce as a basis for regulating them under the CWA.[100] On those grounds, the Ninth Circuit held that "the Corps's jurisdiction under the FWPCA [CWA] extends at least to waters which are no longer subject to tidal inundation because of Leslie's dikes without regard to the location of historic tidal water lines in their unobstructed, natural state."[101]

In sum, the *Froehlke* finding that CWA jurisdiction could extend to waters behind levees was based on two premises: first, that the liquid behind the levees was the "same" as the water in the Bay and equally worthy of protection from pollution; and second, that the end product that was extracted from the impounded water was sold in interstate commerce and therefore within the constitutional limits of the Commerce Clause. However, in the intervening 35 years since the *Froehlke* decision, there have been a number of Supreme Court cases that bear upon the continued validity of these premises and the Ninth Circuit's finding based upon them.

*Frohlke*: "Water" Behind Levees has a Status Equal to Water in the Bay

The Ninth Circuit's premise for affirming CWA jurisdiction in the *Froehlke* case, which is that the liquid behind the levees confining the Bay area salt plants was the "same" water as in the Bay, has been brought into doubt by intervening Supreme Court decisions, at least with respect to the liquids at the Redwood City site. As discussed above, by the time liquids are transferred to the Redwood City site, they have been processed for at least four years, resulting

[96] *Froehlke*, 578 F.2d at 753.
[97] *Id.* at 754-55.
[98] *Id.* at 754.
[99] *Id.* at 755 ("We see no reason to suggest that the United States may protect these waters from pollution while they are outside of Leslie's tide gates, but may no longer do so once they have passed through these gates into Leslie's ponds.").
[100] *Id.* ("Moreover, there can be no question that activities within Leslie's salt ponds affect interstate commerce, since Leslie is a major supplier of salt for industrial, agricultural, and domestic use in the western United States. Much of the salt which Leslie harvests from the Bay's waters at the rate of about one million tons annually enters interstate and foreign commerce.").
[101] *Id.* at 756.

in a significantly higher salinity than the Bay water; they have been hydrologically severed from the larger aquatic system; and they are regulated as pollutants under the CWA. The liquids at the Redwood City site are therefore chemically distinguishable, ecologically distinguishable, and legally distinguishable from the Bay waters. They are no longer the type of resource the CWA was intended to protect. The liquids at the Redwood City site are more commonly understood to be a chemical used in, or a byproduct of, an industrial process rather than "water."

Given what recent Supreme Court precedents reveal about the scope of CWA jurisdiction, we cannot reasonably expect to regulate as "water" liquids that have been managed as part of a closed-system industrial solar evaporation process for a period of several years or more and that are regulated as a pollutant under the CWA. Therefore, the Corps should not assert CWA jurisdiction over the industrial process (pickle and bittern) liquids at the Redwood City site.

*Frohlke*: Interstate Commerce Connection

Because the industrial process liquids at the Redwood City site are not "water" for the purposes of CWA jurisdiction, the question of whether there is an interstate commerce connection with the liquids on the site is no longer relevant. Even with an appropriate interstate commerce connection to the liquids at the site, those liquids must be "water" for CWA jurisdiction to attach. Moreover, the Supreme Court's recent decisions requiring that "the word 'navigable' in the Act must be given some effect" or "significance" when interpreting the jurisdictional scope of the CWA suggest that the type of interstate commerce connection identified by the Ninth Circuit in *Frohlke* is not the type of interstate commerce connection required to establish CWA jurisdiction.[102]

The specific interstate commerce connection the Ninth Circuit cited in *Froelke* was that "Leslie is a major supplier of salt for industrial, agricultural, and domestic use in the western United States."[103] This interstate commerce connection does not give any significance to the word 'navigable' in the Act.[104] After the Supreme Court's decisions in *SWANCC* and *Rapanos*,

[102] *Rapanos*, 547 U.S. at 731 (SCALIA, majority), 779 (KENNEDY, concurring).
[103] *Froehlke*, 578 F.2d at 755.
[104] Additionally, this type of interstate commerce connection was not what was contemplated by the agencies when the CWA regulations were developed. The valid test is not whether a liquid is susceptible to use in interstate commerce by the entity that controls the liquid, but rather whether a liquid is susceptible to use in a manner that would affect interstate commerce by entities other than the entity that controls the liquid. See EPA, *A Collection of Legal Opinions*, Vol. 1 at 295; EPA, Decision of the General Counsel, *NPDES Permits*, Opinion No. 73 (Dec. 15, 1978); 44 Fed.Reg. at 32858.

the Corps should not assert CWA jurisdiction under 33 C.F.R. § 328.3(a)(3) on the basis of a connection to interstate commerce unless there is a significant nexus to navigable waters.[105]

Bases for CWA Geographic Jurisdiction

There does not appear to be any reasonable legal basis for asserting CWA jurisdiction over the Redwood City site. The liquids on the site are more commonly understood to be chemicals used in, or a byproduct of, an industrial process rather than "water." Additionally, the *Froehlke* decision's findings on CWA jurisdiction have been brought into doubt by more recent Supreme Court decisions and should not be relied on when determining CWA jurisdiction at the Redwood City site. For these reasons, the Corps should not exercise CWA jurisdiction over the highly concentrated saline liquids ("pickle") or waste product from this process ("bittern"), and no further CWA analysis is required.

As mentioned above, CWA jurisdiction is normally broader than RHA jurisdiction, but that is not always the case.[106] In some instances CWA jurisdiction is narrower, such as where the principle of indelible navigability is invoked to assert RHA jurisdiction over areas that are no longer inundated with water. Such is the case here. *Milner* holds that this difference "is explained by the RHA's concern with preventing obstructions, on the one hand, and the CWA's focus on discharges into water, on the other."[107]

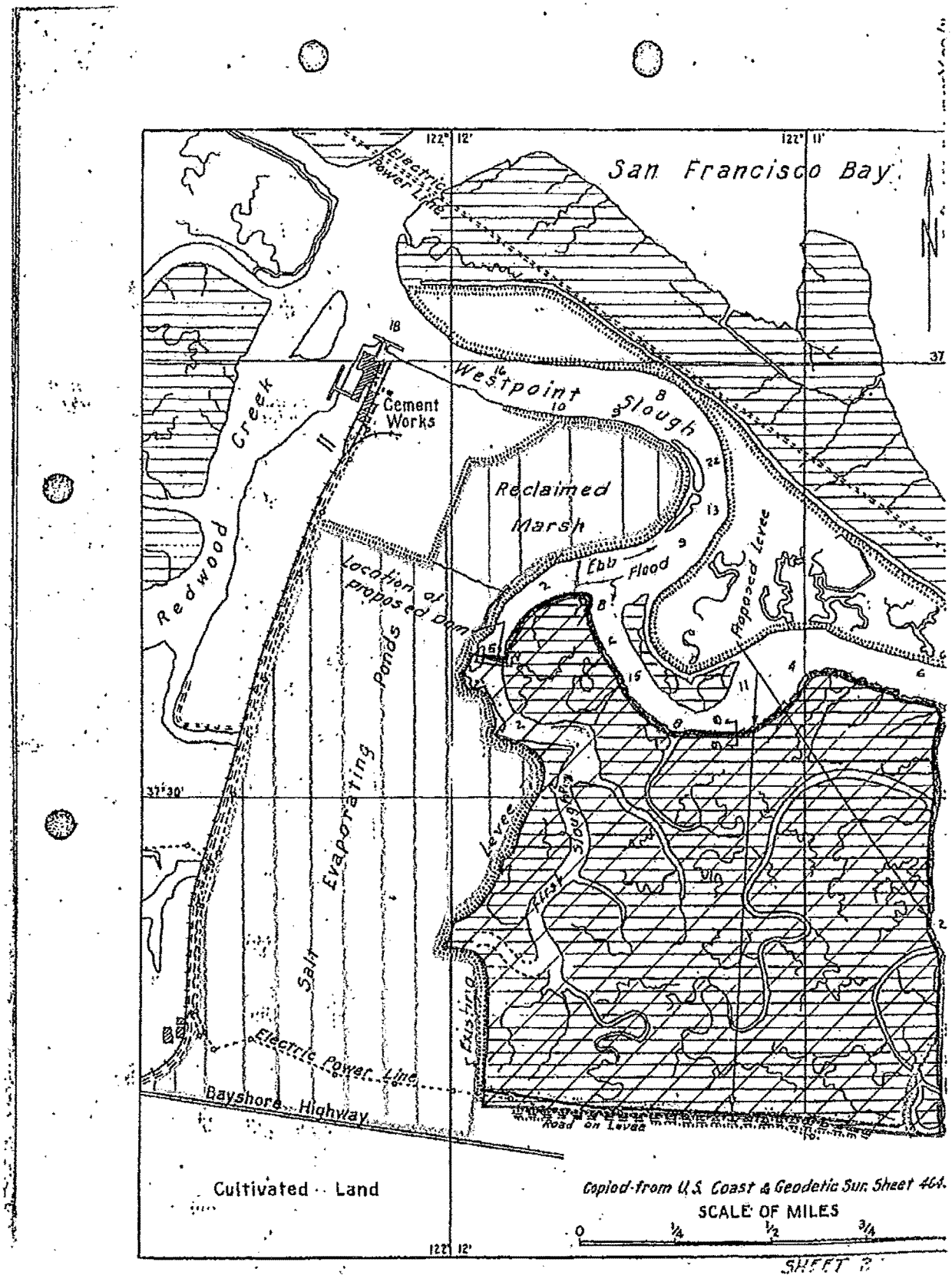
**Continued Coordination**

The close coordination between the San Francisco District, South Pacific Division, and Headquarters staff on the correct legal principles to apply when making RHA and CWA jurisdictional determinations at the Redwood City site is appreciated. This office looks forward to continuing that coordination on the approved jurisdictional determination for the site.

Earl H. Stockdale
Chief Counsel

[105] The meaning of "navigable waters" as that term is used in the CWA has been ruled on by numerous courts, and more is required for a water to be a "navigable water" than just the capacity to float a boat. Waters need to be "susceptible of being used, in their ordinary condition, as highways for commerce" to be navigable-in-fact and thus a "navigable water" on the basis of their capacity to be navigated. *The Daniel Ball*, 77 U.S. 557, 563 (1870). Such susceptibility does not exist at the Redwood City site in its ordinary condition.
[106] *Milner*, 583 F.3d at 1196.
[107] *Id.*

# ATTACHMENT 1




"SHEET 2" from January 19, 1940 War Department Permit

# Supplement to "Legal Principles to Guide the Approved Jurisdictional Determination for the Redwood City Salt Plant" 9 January 2014

CECC-ZA

25 March 2014

## Introduction

This document supplements the 9 January 2014 memorandum titled "Legal Principles to Guide the Approved Jurisdictional Determination for the Redwood City Salt Plant" to address questions raised regarding positions taken in that document and to discuss new information and views that were subsequently provided by the Corps' San Francisco District. Specifically, this document addresses the determination of Rivers and Harbors Act of 1899 (RHA) jurisdiction over the western portion of the Redwood City salt plant site (parcel 1, shown in green on the map attached to the 9 January 2014 document). The previous writing concluded that RHA jurisdiction should not be exercised over the western portion of the site because that area was either never subject to RHA jurisdiction or because any RHA jurisdiction that arguably might have existed over that area had been surrendered.

The discussions between the Corps district, division, and headquarters personnel and a review of the additional information and recommendations provided by the San Francisco District prompted this further elaboration on the issue of surrender and RHA jurisdiction over the western parcel of the site. For the purposes of making an approved jurisdictional determination for the Redwood City site, it is unnecessary to establish a definitive, general rule on how and when surrender of RHA jurisdiction can occur in every situation and circumstance. Likewise, while there is evidence that major portions of the western parcel were never jurisdictional under RHA, it is unnecessary to trace in detail the jurisdictional status of the different areas of the site over time to determine how to proceed under the RHA. The history of permit actions for the site distinguishes the western parcel from those cases in which courts found that jurisdiction has not been surrendered and from the circumstances that were briefed in the *Cargill v. West* case in which the issue of surrender was raised but not litigated to finality with respect to another parcel of Bay-area property in the 1990s.[1]

The history specific to the western portion of the Redwood City salt plant site creates an unfavorable factual record that could form the basis for compelling arguments in any litigation brought by the landowner that either RHA jurisdiction never existed over the western portion of the site, or that any RHA jurisdiction that may have existed prior to the development of the site has been surrendered. The challenges created by the unfavorable factual record are

[1] *Cargill v. West, et al.*, No. C-92-20756-RMW (N.D. Cal. Dec. 23, 1994) (Order Denying Defendants' Motion to Dismiss and Remanding the Case to the Corps).

compounded by the lack of clarity on the legal standard regarding when there is a surrender of RHA jurisdiction. Because of these challenges, which would likely lead to an unfavorable legal precedent from the federal courts, the Corps shall decline to assert any RHA jurisdiction it arguably may have had or has over the western portion of the site.

Legal Standard for Surrender

There is scant case law on surrender of RHA jurisdiction that is pertinent to the circumstances at this site. As previously discussed, the leading case is *United States v. Stoeco Homes, Inc.* However, subsequent decisions have made clear that surrender will not be implied or be based on acquiescence, but must be in "unmistakable terms."[2] However, in the cases where surrender was found, the "unmistakable terms" that accomplished surrender were something less than an explicit statement by the government that regulatory jurisdiction or the navigation servitude was being surrendered or forfeited. There is no bright line rule that can be applied mechanically to determine if there is a surrender. Instead, the factual circumstances of any situation where surrender is a possibility should be evaluated in light of those few cases that have addressed claims that RHA jurisdiction or the navigation servitude was surrendered.[3]

Many cases that address surrender involve condemnation actions or takings claims, but there are several cases with analysis that may be relevant to claims that RHA jurisdiction has been surrendered.[4] Cases where courts have found that jurisdiction was not surrendered generally involved prior acquiescence to obstructions to navigation,[5] fill deposited by the United States in furtherance of navigation,[6] prior activities on tidal wetlands that did not destroy their wetland characteristics,[7] or disposition of fee interest in the land below the MHW mark.[8] The commonality between these cases is that the government action (or inaction) at issue in each case was taken without any statement regarding the jurisdictional status of the waters or former waters at issue, and there was no reasonable basis for expecting the property to be unhindered by the navigation servitude or RHA jurisdiction. In contrast, several cases found that RHA jurisdiction or the navigation servitude were surrendered based on some affirmative government statement regarding the status of RHA jurisdiction or the navigation servitude over the waters at issue, whether it was the formal establishment of harbor lines

[2] *US v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987); *Lambert v. JA Jones*, 835 F2d 1105 (5th Cir 1988).
[3] While there may be grounds for distinguishing regulatory jurisdiction under the RHA and the navigation servitude, as suggested by *Boone v. United States*, 944 F.2d 1489 (9th Cir. 1991), there does not appear to be legal consensus that RHA jurisdiction can only be extinguished through equitable estoppel and not through the surrender analysis employed by the court in *Stoeco*. *See Cargill v. West, et al.*, No. C-92-20756-RMW (N.D. Cal. Jul 12,1994)(Order on Dispositive Motions) (order applying surrender analysis to RHA jurisdiction after the U.S. argued that only equitable estoppel was applicable).
[4] The following is not intended to be an exhaustive examination of all cases addressing surrender.
[5] *U.S. v. Sasser*, 771 F.Supp 720 (D. S.C. 1991).
[6] *US v. 49.79 Acres of Land, More or Less*, 582 F.Supp 368 (D.Del. 1983).
[7] *U.S. v Ciampitti*, 583 F.Supp 483 (D. N.J. 1984).
[8] *US v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987).

behind which fill was given blanket authorization,[9] or entering into a stipulation agreement whereby certain promises were made by the United States to a landowner to protect the landowner's interests and improvements to property over which the navigation servitude was previously asserted.[10] In both of these cases, the court also found that the landowners had a reasonable basis for believing the land was unhindered by the navigation servitude or RHA jurisdiction.

History of the Western Portion of the Redwood City Site

The western portion of the Redwood City site (parcel 1, shown in green on the map attached to the 9 January 2014 document) has a long history of development and involvement by the Corps. Specifically, the three permits discussed below provide evidence of the Corps' understanding of the condition of the western parcel. These permit actions are sufficient for the landowner to make strong arguments that most if not all of that parcel was never subject to RHA jurisdiction, or that any RHA jurisdiction that may have existed over the western parcel has been surrendered.

There is no indication that there were any permits or other authorizations required for the construction of the levees around the western portion of the Redwood City site. This is consistent with the practice at the time of only requiring permits for those activities that would have affected the navigable capacity of navigable-in-fact waters.[11] In 1940, the War Department issued a permit for the construction of levees bordering the eastern portion of the site (parcel 2, shown in red on the map attached to the 9 January 2014 document), immediately adjacent to the western parcel.[12] The 1940 permit identifies the northern portion of the western parcel as "reclaimed marsh" and the rest of the western parcel as "salt evaporating ponds," showing that the western parcel had been developed by that time and that the Corps did not require permits for that work. Admittedly, the 1940 permit request did not propose any work for the western parcel, so representation of the western parcel in that permit is less pertinent to whether there was surrender over the western parcel than the eastern parcel. However, the permit does show that the Corps was aware that the western parcel had been improved for salt-making operations and was no longer in its natural condition. Again, no permits were required for the prior work on the western parcel.

A subsequent Department of War permit issued to Leslie Salt in 1947 more squarely addressed the circumstances of the western parcel.[13] That permit authorized the dredging of material from four separate areas (two areas within Redwood Creek, one area with Westpoint Slough, and one area within a diked area to the west of the western parcel) and the "deposit

[9] *Stoeco*, 498 F.2d 597 (3rd Cir. 1974).
[10] *U.S. v. 119.67 Acres of Land*, 663 F.2d 1328 (5th Cir. 1981).
[11] See *U.S. v. Alaska*, 503 U.S. 569, 580-81 (1992).
[12] War Department Permit Issued to Stauffer Chemical Company, January 16, 1940.
[13] War Department Permit Issued to Leslie Salt Company, April 26, 1947.

[of] the material removed on property belonging to the applicant *above the high water line*."[14] On the map accompanying the permit, the entire area in the western parcel previously identified in the 1940 permit as "salt evaporating ponds" is marked as "area to be filled." The logical interpretation of the language of the permit, read in conjunction with the accompanying map, is that the majority of the western parcel (that portion shown as "salt evaporating ponds" on the 1940 permit) was above the mean high water line in 1947, that is, it had been converted into fast land and was therefore not subject to RHA jurisdiction.[15] Additionally, the public notice soliciting comment on the application for the 1947 permit explicitly stated that the permit "expresses the assent of the Federal Government in so far as concerns the public rights of navigation," making it clear what resource impacts were of interest.[16] This permit did not address the northern-most portion of the western parcel shown as "reclaimed marsh" in the 1940 permit.

In addition, part of this northern-most portion of the western parcel (the "reclaimed marsh") was addressed in a much more recent permit action from 2002.[17] This permit was for the development of Westpoint Marina in part of the area formerly occupied by Cargill's "Pond 10" and that generally corresponds to the area shown as "reclaimed marsh" on the 1940 permit. This area had been used to store bittern. The project that was subject to the 2002 permit action involved construction of an upland area to support roadways and other facilities, as well as the excavation of the marina basin. The only activity that was subject to jurisdiction under the RHA was "work to breach the existing levee after marina construction has been completed." Thus, the Corps did not assert RHA jurisdiction over the interior portion of the site to be developed as Westpoint Marina.[18] It is true that the lack of jurisdiction over the interior portion of this area has little direct relevance to the jurisdictional status of the rest of the site, but it does constitute evidence of the Corps' consistent pattern of practice of not asserting RHA jurisdiction over the western parcel.

## Analysis of Law and Fact

The law regarding surrender is not well defined; there exists significant ambiguity as to what qualifies as the "unmistakable terms" required for there to be a surrender. The cases in which courts found that there was surrender involved some affirmative statement by the government about the jurisdictional status of the property (even if only as a class), as opposed to actions or inaction that did not purport to address jurisdiction. In the case of the western portion of the Redwood City site, there are multiple affirmative statements from the Corps that

[14] *Id.* (emphasis added).
[15] *U.S. v. Willow River Power Co.*, 324 U.S. 499, 509 (1945)("High-water mark bounds the bed of the river. Lands above it are fast lands. . .").
[16] War Department, Corps of Engineers San Francisco District, Public Notice No. 47-43, March 28, 1947 (emphasis in original).
[17] USACE San Francisco District, *Public Notice; Project: WestPoint Marina*, Permit No. 22454S (May 17, 2002).
[18] In the permit for the Westpoint Marina, the Corps asserted RHA jurisdiction over work within the interior of the marina basin once the exterior levee was breached and the basin was inundated with water directly from the Bay.

could reasonably be interpreted to qualify as the type of unmistakable terms that the court relied on in *Stoeco* to find a surrender of any regulatory jurisdiction that may have existed. This is in contrast to the eastern portion of the site, where the initial activity modifying the natural topography was subject to a permit that contained an explicit reservation of jurisdiction.

Should the Corps assert RHA jurisdiction over any portion of the western parcel, there is a substantial likelihood that the property owner would challenge that assertion of jurisdiction in the federal courts. Given the uncertain law and the unfavorable facts regarding surrender in this circumstance, there is a high likelihood that a court could make bad law on surrender were the Corps to assert RHA jurisdiction over the western portion of the Redwood City site.

Alternative Interpretation of RHA Jurisdiction under *Froehlke* and *Milner*

In discussions with the San Francisco District about the 9 January 2014 memorandum, an alternative interpretation of the legal standard for RHA jurisdiction that should be derived from *Froehlke* and *Milner* was proffered.[19] It was suggested that the rule established in *Froehlke* and followed in *Milner* that RHA jurisdiction "extend[s] to all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state" should be interpreted to mean that any area that *is currently* below the theoretical plane of the MHW mark projected across the landscape or that *would currently be* below this theoretical plane but for an artificial improvement (such as a levee as in *Froehlke* or a shore defense structure as in *Milner*, but possibly including other artificial improvements) is subject to RHA jurisdiction. Thus, in the case of a low-lying area separated from tidal waters by a levee, the levee and any area behind it that is below the elevation of the current MHW mark would be currently subject to RHA jurisdiction even if those areas had never been covered by water in the past.

Neither *Froehlke* nor *Milner* require this interpretation. The *Froehlke* decision merely determined whether the relevant benchmark for jurisdiction on the Pacific was the MHW mark or the mean higher high water (MHHW) mark, and did not apply the standard established to the circumstances in the case, so it is impossible to know how that court intended the standard to be implemented.[20] The *Milner* decision only held that the shore defense structures that were previously above the MHW mark at the time that they were constructed, but have come to be, at least in part, below the MHW mark now (because of erosion, sea level rise, or other changes), are now subject to RHA jurisdiction.[21] The court in *Milner* did not make any explicit holding regarding RHA jurisdiction over lands lying on the upland side of those shore defense structures. Thus, neither case held that land that is currently below the projected plane of the MHW line in its unobstructed natural state, but that currently is not covered with water due to

[19] *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 753 (9th Cir. 1978) (hereinafter "*Froehlke*"); *U.S. v. Milner*, 583 F.3d 1174, 1191 (9th Cir. 2009).
[20] *Froehlke*, 578 F.2d at 753.
[21] *Milner*, 583 F.3d at 1193.

an artificial obstruction, is now subject to RHA jurisdiction. The standard established for RHA jurisdiction in the 9 January 2014 memo is consistent with the holdings of *Froehlke* and *Milner*, more closely follow the Corps regulations implementing the RHA, and has more defensible implications for what areas may currently be jurisdictional under the RHA.

However, even if one were to accept the San Francisco District's alternative interpretation of the rule dictated by *Froehlke* and *Milner*, a court reviewing the matter would likely find that there is no RHA jurisdiction over the western parcel based on the San Francisco District's long-standing and well-publicized policy for determining RHA jurisdiction behind dikes or levees. The policy provides:

> Section 10 [RHA] jurisdiction will be exercised over areas behind dikes if <u>all</u> of the following criteria are met:
>
> 1. The area is <u>presently</u> at or below mean high water (MHW),
> 2. The area was historically at or below MHW in its "unobstructed, natural state" (i.e., the area was at or below MHW before the dikes were built), and
> 3. There is no evidence (elevation data) that the area was ever above MHW.[22]

Applying the evidence previously discussed to the rules established in the San Francisco District policy would result in a strong case that no RHA jurisdiction now can be or should be exercised. Specifically, the western portion of the site appears to fail the second and possibly the third elements of the District policy. As previously discussed, the 1947 permit indicates that the area identified as "salt evaporating ponds" on the 1940 permit was above MHW at the time of the 1947 permit evaluation, meaning that the third element is not satisfied. The evidence is less direct for the area identified as "reclaimed marsh" in the 1940 permit, but the 1940 permit along with the 2002 Westpoint Marina permit and maps that predate the development of the site all suggest that the "reclaimed marsh" area was above MHW either before the levees were constructed or were made so subsequently, and therefore fails either the second or third elements of the policy, or both. If the Corps were now to try to assert RHA jurisdiction over the western portion of the site, a reviewing federal court likely would rule that the Corps is now estopped from asserting RHA jurisdiction, because the owners of that portion have relied on the District policy that precludes the assertion of jurisdiction since at least 1983, the year in which the policy was promulgated.

## Conclusion

The landowners of the Redwood City salt plant site have several strong legal arguments supporting their position that RHA jurisdiction should not be exercised over the western

[22] Calvin Fong, Chief, Regulatory Functions Branch, *Reg. Functions Bull. Memorandum, Regulatory Function's Policy on Section 10 Jurisdiction Behind Dikes (Levees)* (May 25, 1983) (emphasis in original; internal citations omitted).

portion of the stie. There is substantial evidence that would receive deference from the Federal courts that any RHA jurisdiction that may have existed over the western portion of the site was surrendered, or alternatively that jurisdiction should not be exercised based on long-standing District policy. Therefore, as a matter of judgment and risk calculation, based on the specific facts and history discussed above, which are unique to the site, the Corps shall decline to assert any RHA jurisdiction that it may be able to claim over the western portion of the Redwood City site.

Earl H. Stockdale
Chief Counsel